72-1483 FILE COPY

Supreme Court, U. S.
FILED
MAY 2 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1483

DOUGLAS FREDERICK HELLWIG and
JOHN EDWARD WILLIAMS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit

GILBERT EISENBERG
MESSRS. FILIPPELLI & EISENBERG
450 Sansome Street, Suite 406
San Francisco, California 94111
Counsel for Petitioners

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	2
Statement	3
A. Nature of the Proceedings Below	3
B. Statement of Facts	5
Reasons Compelling Allowance of the Writ	9
Review Is Necessary to Resolve the Disparate and Conflicting Decisions Rendered by the Circuit Courts Below Regarding the Definitions and Standards Applicable to So-Called "Border Searches"	9
Conclusion	18
Appendix	

TABLE OF AUTHORITIES CITED

Cases	Pages
Alexander vs. United States, 362 F.2d 379 (9 Cir. 1966)	11
Carroll vs. United States, 267 U.S. 132 (1925)	10, 18
Castillo-Garcia vs. United States, 424 F.2d 482 (9 Cir. 1970)	11, 14, 15
Chambers vs. Maroney, 399 U.S. 42 (1970)	10
Coolidge vs. New Hampshire, 403 U.S. 443 (1971)	2, 18
Davis vs. United States, 431 F.2d 693 (5 Cir. 1970)	15
Dyke vs. Taylor Implement Co., 391 U.S. 216 (1968)	10
Harris vs. United States, 400 U.S. 1211 (1970)	13, 17
King vs. United States, 348 F.2d 814 (9 Cir. 1965)	11
Marsh vs. United States, 344 F.2d 317 (5 Cir. 1965)	15, 16
Morales vs. United States, 378 F.2d 187 (5 Cir. 1967)	11
Ramirez vs. United States, 263 F.2d 385 (5 Cir. 1969)	15
Rodriguez-Gonzales vs. United States, 378 F.2d 256 (9 Cir. 1967)	14
Valadez vs. United States, 358 F.2d 721 (5 Cir. 1966)	16
Valenzuela-Garcia vs. United States, 425 F.2d 1170 (9 Cir. 1970)	11
Walker vs. United States, 404 F.2d 900 (5 Cir. 1968)	16
United States vs. Almeida-Sanchez, 452 F.2d 459 (9 Cir. 1972)	13, 14, 17
United States vs. Ardle, 435 F.2d 861 (9 Cir. 1970)	15
United States vs. Candlis, 432 F.2d 132 (9 Cir. 1970)	15

Pages

United States vs. Elder, 425 F.2d 1002 (9 Cir. 1970).... 15
United States vs. Glaziou, 402 F.2d 8 (2 Cir. 1968).....11, 16
United States vs. Guadalupe-Garza, 421 F.2d 876 (9 Cir. 1970) 14
United States vs. Markham, 440 F.2d 1119 (9 Cir. 1971) 11, 13
United States vs. Oswald, 441 F.2d 444 (9 Cir. 1971).... 15
United States vs. Warner, 441 F.2d 821 (5 Cir. 1971).. 16
United States vs. Weil, 432 F.2d 1320 (9 Cir. 1970)....11, 13, 14, 15

STATUTES

19 U.S.C., Section 482 .....2, 3, 10, 17
21 U.S.C., Section 841(a)(1) 2, 4
21 U.S.C., Section 846 ..... 2, 4
21 U.S.C., Section 952 3
21 U.S.C., Section 960 3
21 U.S.C., Section 963 3
28 U.S.C., Section 1254(1) 2

CONSTITUTIONS

Fourth Amendment, United States Constitution .....*passim*

MISCELLANEOUS

Annotation, *Validity of Border Searches and Seizures by Customs Officials,* 6 AL.R.Fed. 317 14

Comment, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers.* N.Y.Univ. Journal of International Law and Politics, Vol. 5: 93 (Spring, 1972) 14

Note, *At the Border of Reasonableness: Searches by Customs Officials,* 53 Cornell L.Rev. 871 (May, 1968) 14

Note, *Intrusive Border Searches—Is Judicial Control Desirable?,* 115 Univ. of Pa.L.Rev. 276 (1966) 14

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

DOUGLAS FREDERICK HELLWIG and
JOHN EDWARD WILLIAMS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit

---

Petitioners, Douglas Frederick Hellwig and John Edward Williams, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case (Court of Appeals Nos. 72-2137 and 72-2185) on March 8, 1973.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit was not reported. A copy of this opinion is attached hereto as "Appendix".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether and to what extent the Fourth Amendment of the United States Constitution restricts the power of customs officers to conduct warrantless searches of vehicles under Title 19, United States Code, Section 482.

2. Whether customs officers are excused from securing a warrant to search a vehicle within the territory of the United States absent "exigent circumstances" as defined by this Court in *Coolidge vs. New Hampshire,* 403 U.S. 443 (1971).

STATUTES INVOLVED

The statutes under which petitioners were prosecuted under Counts III and IV of the Indictment, the only relevant charges here involved, were 21 U.S.C. § 841(a)(1) (1970) and 21 U.S.C. § 846, which provides as follows:

> "§ 841. *Prohibited acts A—Unlawful acts*
>
> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> "(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."
>
> § 846. *Attempt and conspiracy*
>
> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The statute authorizing warrantless searches of vehicles by customs officials is 19 U.S.C. § 482 (1866) which provides as follows:

> "§ 482. *Search of vehicles and persons*
>
> "Any of the officers or persons authorized to board of search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. § 3061."

STATEMENT

A. Nature of the Proceedings Below.

Petitioners Hellwig and Williams were indicted on a four count indictment on September 15, 1971. They were charged in Count I with knowingly and intentionally conspiring to illegally import 845 pounds of marijuana in violation of Title 21, United States Code, Sections 952, 960, and 963; in Count II with knowingly and intentionally importing and attempting to import approximately 845 pounds of marijuana in violation of Title 21, United States Code, Sections 952, 960 and 963; in Count III with knowingly and inten-

tionally possessing, with intent to distribute, approximately 845 pounds of marijuana in violation of Title 21, United States Code, Section 841(a)(1) and Section 846; and in Count IV with knowingly and intentionally possessing, with intent to distribute, 845 pounds of marijuana in violation of Title 21, United States Code, Section 841(a)(1).

Petitioners were tried by the Court on March 30 and 31, 1972 (United States District Court, Southern District of California). Petitioners were found guilty on Counts III and IV only. Judgment was entered on May 2, 1972. Petitioner Hellwig was sentenced to a term of 3 years imprisonment, and petitioner Williams was sentenced to a term of 2 years imprisonment.

On May 1, 1972, petitioners filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. On May 2, 1972, petitioner Hellwig was admitted to bail on appeal in the amount of $25,000.00, and petitioner Williams was admitted to bail on appeal in the amount of $10,000.00. The convictions of petitioners herein were affirmed pursuant to judgment of the Court of Appeals for the Ninth Circuit entered March 8, 1973 (Appendix).

On March 21, 1973, petitioners filed for rehearing in the United States Court of Appeals for the Ninth Circuit. Rehearing was denied pursuant to an order of the appellate court entered on April 2, 1973.

On April 6, 1973, petitioners moved the Court of Appeals for a stay of its mandate pending application to this Honorable Court for a writ of certiorari pursuant to Rule 41(b), Federal Rules of Appellate Procedure. Pursuant to an order of the Court of Appeals for the Ninth Circuit entered April 9, 1973, issuance of the mandate was stayed pending the filing, consideration and disposition by this Honorable Court of the Petition for a Writ of Certiorari herein.

B. Statement of Facts.

On December 6, 1971, and prior to trial, a hearing was held before the Honorable J. Clifford Wallace, in the United States District Court for the Southern District of California on petitioners' motion to suppress evidence. At that time all parties by and through their counsel stipulated that if the Government's witnesses were called, that their testimony would tend to prove the same facts set forth in the affidavit of John R. Neese, assistant United States Attorney, which was attached to the Government's opposition to petitioners' motion to suppress (RT 13-14, proceedings of Dec. 6, 1971, hereinafter referred to as: "RT ..... 12/6/71"). By stipulation of the parties, no testimony was taken at this hearing (RT 14, 12/6/71). That affidavit was, therefore, the record before the court on the issue of the legality of the search involved in the case. The affidavit is hereby set forth in its entirety:

> "On September 8, 1971, Captain Richard Ramirez of the Imperial County Sheriff's Department advised Customs Senior Resident David F. Burnett that there were three persons, two of which were later identified as John Edward Williams and Douglas Frederick Hellwig, who were staying at Room 7 of the [El Dorado] Motel in El Centro, California. Williams and Hellwig had been using a 1970 Pontiac Bonneville bearing California license 195 ECI. Investigation by Captain Ramirez revealed that the vehicle was registered to Michael Scott Adams, who had been arrested in Santa Cruz County, California, on July 7, 1971, when he was found in possession of 235 kilos of marijuana.
>
> "Surveillance of the room and vehicle were set up and at aproximately 6:00 p.m. Williams and Hellwig left El Centro, California, in the 1970 Pontiac with Williams at the driver and Hellwig as passenger. They arrived at Calexico, California, and parked at the 200 block of Second Street, several hundred yards north of

the international border. Hellwig alighted from the vehicle and entered Mexico afoot where he was observed walking to a taco stand adjacent to a parking lot. He stayed there briefly and returned back across the border into Calexico and entered the 1970 Pontiac driven by Williams. The two defendants drove around Calexico for approximately 15 minutes and parked at the Fed Mart parking lot in Calexico.

"Hellwig then left the 1970 Pontiac and entered the Fed Mart store and after a few minutes returned from the store and entered a 1965 Pontiac Bonneville bearing California license NMU 599. This car was dusty as if it had been taken cross country and seemed to be very heavily loaded in the rear. Hellwig, with Williams following, then drove back to El Centro, California, and parked at the [El Dorado] Motel and entered Room 7.

"Based upon the above information and his previous experience with smuggling operations, Agent Fernandez believed that Hellwig had crossed the border to meet his contact, to pay for the marijuana and have the load car's location outlined to him. When Hellwig returned to the Fed Mart lot, a common drop-off point for load vehicles, his suspicions were confirmed, especially in light of the appearance of the vehicle.

"Continuous surveillance was set up throughout the night and at 6:15 a.m. Hellwig left Room 7 and was followed out shortly thereafter by Williams. Hellwig entered the 1965 Pontiac and Williams entered the 1970 Pontiac and they began to drive south on Imperial Avenue in El Centro, California, traveling closely together. Both vehicles entered Interstate 8 and headed west where they were stopped approximately seven miles from El Centro.

"A search of the 1965 Pontiac revealed 382 kilo packages of marijuana in the trunk compartment.

"Hellwig and Williams were placed under arrest, advised of their rights and elected to remain silent. However, while Hellwig was being transported to the Im-

perial County Jail he made a spontaneous statement saying, 'I shouldn't have picked up that load.'

"Upon arriving at the Imperial County Jail defendants were searched and Hellwig was found to be in possession of $1595 and Williams was in the possession $348.02 (Clerk's transcript, pp. 45-47, hereinafter referred to as "C T p. .....").

On March 30 and 31, 1972, at the trial of the case, the Government presented evidence which revealed the following facts:

On September 8, 1971, police officers at the Imperial County Sheriff's Department and agents of the United States Bureau of Customs initiated surveillance on the two petitioners in El Centro, California. The two petitioners were staying in Room 7 of the El Dorado Motel in El Centro (RT 7-8, 93-94, 124, 150, 3/30/72).

At approximately 6:00 P.M. on September 8, 1970, petitioners Hellwig and Williams left Room 7 in the El Dorado Motel and got into a 1970 Pontiac automobile (RT 8, 3/30/72).

Petitioner Williams drove and petitioner Hellwig rode on the passenger side from the El Dorado Motel in El Centro to the vicinity of Second Street and Heffernan in Calexico, California (RT 40, 3/30/72). This point is approximately two blocks from the international boundary. The petitioner Hellwig got out of the Pontiac and walked south into Mexicali, Mexico (RT 40-41, 3/30/72). Williams remained in the car at the 200 block of Second Street (RT 41, 126, 3/30/72).

Hellwig walked one block south from the international border to a taco stand (RT 42, 3/30/72). At the taco stand Hellwig bought a soft drink and had some conservation with a person who served him at the taco stand (RT 46, 3/30/

72). Hellwig remained at the taco stand a few minutes and then immediately returned to the United States through the port of entry at Calexico (RT 47, 3/30/72). After passing through the port of entry, Hellwig rejoined Williams who was waiting for him in the 1970 Pontiac near Second and Heffernan (RT 49, 3/30/72). The Pontiac with both petitioners then proceeded to Imperial Avenue where it turned northbound and proceeded to the Fed Mart parking lot in Calexico (RT 51, 54, 126, 3/30/72).

Approximately five minutes after entering the Fed Mart parking lot, the petitioner Hellwig exited the parking lot driving a 1965 Pontiac (RT 55, 127, 3/30/72). Williams, driving the 1970 Pontiac, followed the 1965 Pontiac to the parking lot of the El Dorado Motel (RT 57, 3/30/72). Both petitioners returned to Room 7 of the El Dorado Motel at approximately 7:15 P.M. (RT 9, 3/30/72).

At approximately 11:15 P.M., both petitioners left Room 7, got into the 1970 Pontiac and drove to a restaurant where both petitioners went inside (RT 9, 60, 3/30/72). Hellwig and Williams remained inside the restaurant for 45 minutes, at which time they returned to the 1970 Pontiac and drove back to the El Dorado Motel, arriving there at approximately 12 o'clock midnight (RT 10, 77, 78, 3/30/72).

Continuous surveillance was maintained on Room 7 of the El Dorado Motel throughout the night (RT 10, 94, 128, 3/30/72). At approximately 6:00 A.M., petitioner Hellwig exited Room 7, went to the 1965 Pontiac and cleaned the windows and windshield (RT 129, 3/30/72). Hellwig also opened the hood and appeared to put water in the radiator (RT 129, 3/30/72). A short time after petitioner Hellwig exited the room, petitioner Williams walked out of the room and was observed standing near Hellwig as he was servicing the 1965 Pontiac (RT 129-130, 3/30/72). Hellwig then

entered the 1965 Pontiac and Williams entered the 1970 Pontiac (RT 130, 131, 3/30/72). Both cars then exited the parking lot of the El Dorado Motel with the 1965 Pontiac leading the 1970 Pontiac (RT 130, 3/30/72). Both vehicles proceeded approximately 4 or 5 miles onto Interstate 8 where they were stopped (RT 63, 96, 131, 151, 3/30/72).

Hellwig, who was driving the 1965 Pontiac, was asked to open the trunk of the vehicle (RT 151, 3/30/72). Since no search warrant was produced, Hellwig refused to open the trunk at which time customs agent Sears removed the keys from the ignition and opened the trunk of the vehicle (RT 151, 3/30/72). Immediately upon opening the trunk, the customs agents and Sheriff's officers observed a large number of kilo packages containing what appeared to be marijuana (RT 98, 151, 3/30/72). A later count disclosed that the total number of kilo packages of marijuana was approximately 380 (TR 98, 3/30/72).

Hellwig and Williams were then both placed under arrest, advised of their rights and elected to remain silent (RT 131, 152, 153, 3/30/72). Both petitioners were taken into custody and transported to the Imperial County Sheriff's Office (RT 154, 3/30/72).

REASONS COMPELLING ALLOWANCE OF THE WRIT

Review Is Necessary to Resolve the Disparate and Conflicting Decisions Rendered by the Circuit Courts Below Regarding the Definitions and Standards Applicable to So-Called "Border Searches."

It is petitioners' position that the search of the automobile involved was illegal in that it could neither be sustained as a valid "border search" nor on the basis of probable cause. As a general rule, to satisfy the Fourth Amendment, a search and seizure must be based upon probable cause and must be authorized by a warrant issued by a judicial officer.

An authorized officer may stop and search an automobile on a public highway without a warrant, however, in a case where the moving vehicle would disappear before a warrant could be obtained. But, to conduct a constitutional search, the officer must have probable cause to believe the vehicle is carrying contraband; nothing in the mobility of the automobile itself justifies an intrusion upon personal privacy at the whim or on the unsupported hunch of a government agent. *Chambers vs. Maroney,* 399 U.S. 42 (1970); *Dyke vs. Taylor Implement Co.,* 391 U.S. 216 (1968); *Carroll vs. United States,* 267 U.S. 132 (1925).

Section 482 of Title 19, United States Code, provides United States Customs agents with statutory authority to stop and search persons or vehicles on which or whom they reasonably suspect there is contraband which has been introduced into the United States contrary to law. This statute provides no express limitations of time or distance, but says only that officers "may stop, search, and examine, as well without as within their respective districts." Although the term "border search" does not appear in the Constitution or in Section 482 of Title 19, courts have used the phrase to describe the limitation imposed by the Fourth Amendment upon the right of Customs agents to search persons and vehicles without probable cause. The exception is recognized in the following passage in *Carroll vs. United States,* supra, 267 U.S. at 153-154:

> "Having thus established the contraband goods concealed in and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such a search may be made. It would be intolerable and unreasonable if a prohibition agent was authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the high-

ways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. *But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise . . .*" (emphasis added).

Thus the "border search" exception rests upon the inherent right of sovereignty to protect and police national boundaries (*United States vs. Weil*, 432 F.2d 1320 (9 Cir. 1970); *Alexander vs. United States*, 362 F.2d 379 (9 Cir. 1966); *King vs. United States*, 348 F.2d 814 (9 Cir. 1965); *United States vs. Glazion*, 402 F.2d 8 (2 Cir. 1968); *Morales vs. United States*, 378 F.2d 187 (5 Cir. 1967)). Since the exception is in derogation of normal Fourth Amendment principles, it must be narrowly construed. Since the power to conduct a border search without probable cause or warrant derives from illegal entry, it may be exercised only in connection with a border crossing (*United States vs. Markham*, 440 F.2d 1119 (9 Cir. 1971)). While a "border search" is not limited only to the point of entry, it is limited by the requirement that a search conducted away from the immediate vicinity of the border must be substantial equivalent of a search upon entry (*Alexander vs. United States*, supra; *Valenzuela-Garcia vs. United States*, 425 F.2d 1170 (9 Cir. 1970); *Castillo-Garcia vs. United States*, 424 F.2d 482 (9 Cir. 1970)).

In the instant case, there was absolutely no evidence of any vehicular border crossing. The only salient facts in the

possession of the Customs officials who conducted the search were:

1. The registered owner of the automobile in which petitioners had arrived in El Centro had been arrested in Santa Cruz County, California, two months prior to that date for possession of 235 kilos of marijuana.

2. Petitioner Hellwig had entered Mexico on foot, purchased a soft drink at a taco stand, and returned to the United States through the port of entry.

3. After returning to the United States, petitioner Hellwig went directly to the Fed Mart parking lot in Calexico. This parking lot was purportedly a "common drop-off point for vehicles containing loads of contraband".

4. The 1965 Pontiac which petitioner Hellwig picked up at the Fed Mart parking lot was dusty and seemed to be heavily loaded in the rear.

Petitioners' main contention in the courts below was that under these facts the search could qualify as neither a valid "border search" nor as a valid warrantless vehicle search based upon probable cause. In ruling on petitioners' motion to suppress, the trial court below agreed that there was no probable cause to search and arrest, but sustained the search on the basis of principles regarding "border searches":

> "Prior to the *Markham* case, I don't know how you would ever sustain the search. Counsel, of course, is right; there is no probable cause for arrest until the marijuana was found. The customs agents were not looking for aliens, and so they had no right to stop the vehicle unless there was probable cause shown" (comments of Honorable J. Clifford Wallace, Judge Presiding, RT 26, 12/6/71).

Based upon the trial court's ruling, the parties on appeal limited their arguments to the question of the validity of the

search under the principles enunciated regarding "border searches."

Although the appellate court agreed with petitioners' argument that the search in question could not be justified as a "border search", it went on to justify the search on the basis of probable cause. This alternative justification for the search is based upon the appellate court's independent review of the facts and its opinion that probable cause is a *less exacting* standard than that required to sustain a border search. The appellate court stated:

> "We agree with appellants that the search here in question cannot be justified as a border search. Such a search is not authorized by the suspected presence of contraband but rather because the contents, whatever they may be, have crossed the border without having been subjected to inspection. *Reasonable certainty (a higher standard than probable cause) that such is the case is necessary.* That certainty is lacking here" (Opinion of the Court of Appeals for the Ninth Circuit, Appendix, p. 1, emphasis added).

Petitioners respectfully submit that the appellate court's opinion totally misapprehends the law regarding the relative standards applicable to the alternative theories of probable cause and "border searches". Clearly the standard applicable to searches justified upon the basis of probable cause is *higher* than that regarding "border searches". (*United States vs. Markham*, supra; *United States vs. Weil*, 432 F.2d 1320 (9 Cir. 1970).

The opinion of the Court of Appeals herein typifies the confusion which has surrounded issues regarding the propriety of "border searches" in light of Fourth Amendment restrictions. The problem has been emphasized by courts and commentators alike. See for example: *Harris vs. United States*, 400 U.S. 1211 (1970); *United States vs. Almeida-*

Sanchez, 452 F.2d 459 (9 Cir. 1972), dissenting opinion of Judge Browning; Comment, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers,* N.Y. Univ. Jour. of International Law and Politics, Vol. 5: 93 (Spring, 1972); Note, *At the Border of Reasonableness: Searches by Customs Officials,* 53 Cornell L.Rev. 871 (May, 1968); Annotation, *Validity of Border Searches and Seizures by Customs Officers,* 6 A.L.R.Fed. 317.

In initial attempts to avoid conflict between the exercise of the statutory power of Customs officials to conduct warrantless searches and the requirements of the Fourth Amendment courts have construed the statutes to apply solely to border searches (*United States vs. Weil,* supra) and required that all border searches meet minimum Fourth Amendment standards of "reasonableness" (*United States vs. Guadalupe-Garza,* 421 F.2d 876, 878 (9 Cir. 1970)). Most of the earlier cases regarding border searches held that the determination of "reasonableness" was dependent, at least in part, upon the proximity of such searches to the international border. (See e.g., cases collected in Note, *Intrusive Border Searches—Is Judicial Control Desirable?,* 115 Univ. of Pa. L.Rev. 276, 279-80, n. 28 (1966).) This requirement of proximity to the border has under recent decisions been practically abandoned. (See e.g., *Castillo-Garcia vs. United States,* 424 F.2d 482 (9 Cir. 1970) upholding a "border search" occurring 105 miles within the United States at a time 7 hours after entry; *Rodriguez-Gonzales vs. United States,* 378 F.2d 256 (9 Cir. 1967) upholding a border search occuring 20 miles within the United States, some 15 hours after entry.) The standards have been relaxed to such an extent that the right to search vehicles without probable cause is not even limited to those vehicles which have recently crossed the border. As the court in *Weil* stated:

> ". . . if customs agents are reasonably certain that parcels have been (a) smuggled across the border and (b) placed in a vehicle, whether the vehicle has itself crossed the border or not, they may stop and search the vehicle. Similarly, if the agents are reasonably certain that a person has crossed the border illegally, and has entered a vehicle on this side of the border, we think that they may stop and search the vehicle and person. They can assume that he may have brought something with him" (*United States vs. Weil*, 432 F.2d 1320 at 1323 (9 Cir. 1970), cert. denied, 401 U.S. 947 (1971)).

Subsequent cases of the Ninth Circuit have not indicated whether the test of "reasonable certainty" required a different standard of cause than "mere suspicion" (*United States vs. Ardle*, 435 F.2d 861 (9 Cir. 1970), cert. denied, 402 U.S. 947 (1971); *United States vs. Oswald*, 441 F.2d 444 (9 Cir. 1971); *United States vs. Candlis*, 432 F.2d 132 (9 Cir. 1970); *United States vs. Elder*, 425 F.2d 1002 (9 Cir. 1970)). The Ninth Circuit has, however, imposed the requirement that Customs officials keep the vehicle under constant surveillance from the port of entry to the point of search in cases where the "border search" occurs well within the United States (*Castillo-Garcia vs. United States*, 424 F.2d 482 (9 Cir. 1970)).

Unlike the Ninth Circuit, the Fifth Circuit has not required constant surveillance nor has it inquired into the condition of the vehicle at the time of search relative to the time of entry (*Davis vs. United States*, 431 F.2d 693 (5 Cir. 1970); *Marsh vs. United States*, 344 F.2d 317 (5 Cir. 1965); *Ramirez vs. United States*, 263 F.2d 385 (5 Cir. 1969)). The Fifth Circuit has held that the validity of an extended border search turns upon the issue of whether "the circumstances known to the officer" amount to "reasonable cause

to suspect" that a violation of the customs laws is taking place (*United States vs. Warner*, 441 F.2d 821 (5 Cir. 1971); *Valadez vs. United States*, 358 F.2d 721 (5 Cir. 1966); *Marsh vs. United States*, supra).

Courts of the Second Circuit, noting the different approaches taken by the Fifth and Ninth Circuits, has emphasized the factors of elapsed time and distance from the moment and location of entry as relevant to the determination of reasonableness (*United States vs. Glaziou*, 402 F.2d 8, 14, n. 3 (2 Cir. 1968), cert. denied, 393 U.S. 1121 (1969)).

The Fifth Circuit has continued, however, to focus primarily upon the extent to which the searching officers' suspicions were justified. According to this view, the border is "elastic," and may be stretched to virtually any length as long as the required basis for suspicion is present (*Marsh vs. United States*, supra). This basis of "justifiable suspicions" has revealed itself to be without limits either in time (*Walker vs. United States*, 404 F.2d 900 (5 Cir. 1968)) (8 hours) or distance (*Marsh vs. United States*, 344 F.2d 317 (5 Cir. 1965) (63 Miles).

While the positions taken by the various Circuits differ a great deal, there is a common thread to all of these decisions. The term "border search," as presently used, is a misnomer. It is now merely judicial shorthand used to describe the powers of Customs officials to search without probable cause, without limitation to any particular geographic area or time since entry into the United States, and without a warrant. Petitioners know of no decision of this Honorable Court which might provide guidance or resolve the obvious conflicts which have developed in this area. As noted by Mr. Justice Douglas:

"The rather old dictum of this Court in *Carroll v. United States* (citation omitted) hardly meets the refinements of these new distinctions" (*Harris vs. United States*, 400 U.S. 1211 at 1213 (1970)*.

The need for a uniform standard enunciated by this Honorable Court as illustrated by the conflicts in the Circuits below is underscored by the conflict within the Ninth Circuit itself under the decisions rendered with regard to the instant case. Whereas the multitude of decisions have held that the objective standard regarding probable cause is *higher* and *more exacting* than that regarding justifiability of a border search, the appellate court's opinion herein (Appendix) holds that border searches are tested by a *higher* standard than probable cause.

Clearly a search not sustainable under Section 482, Title 19, United States Code, cannot upon *de novo* review of the facts by the appellate court be sustained on the basis of probable cause. Moreover, even if, *arguendo* the Customs officials involved herein had probable cause to search petitioners' vehicle, there were no exigent circumstances which would excuse them from obtaining or attempting to obtain a search warrant. If indeed probable cause existed, it was formed on September 8, 1971, when petitioner Hellwig entered the 1965 Pontiac Bonneville at the Fed Mart parking lot in Calexico. This occurred between 6 P.M. and 7:15 P.M. on September 8, 1971. Petitioners were not arrested until the following morning. Constant surveillance of petitioners' motel room showed that no attempt was made to remove the

*Certiorari has recently been granted in a case involving similar issues as to the propriety of a warrantless search, but there the search was conducted by immigration officials (*United States vs. Almeida-Sanchez*, 452 F.2d 459 (9 Cir. 1971), cert. granted, 406 U.S. 944 (1972)).

vehicle during the night. Accordingly, there was ample time in which the Customs officials could have secured a search warrant. No reason appears in the transcript to explain why a search warrant was not sought. Absent exigent circumstances making it not practicable to secure a warrant, failure to obtain a warrant invalidates the search (*Coolidge vs. New Hampshire*, 403 U.S. 443 (1971); *Carroll vs. United States*, supra).

CONCLUSION

For the reasons stated above, this Honorable Court should grant the petition for writ of certiorari and dispose of the issues surrounding this significant area of criminal justice.

Respectfully submitted,

GILBERT EISENBERG
MESSRS. FILIPPELLI & EISENBERG
Counsel for Petitioners

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DOUGLAS FREDERICK HELLWIG, *Defendant-Appellant.*	No. 72-2137
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN EDWARD WILLIAMS, *Defendant-Appellant.*	No. 72-2185

[March 8, 1973]

On Appeal from the United States District Court
for the Southern District of California

Before: MERRILL and KOELSCH, Circuit Judges, and GRAY, District Judge*

MEMORANDUM

MERRILL, Circuit Judge:

We agree with appellants that the search here in question cannot be justified as a border search. Such a search is not

*Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

authorized by the suspected presence of contraband but rather because the contents, whatever they may be, have crossed the border without having been subjected to inspection. Reasonable certainty (a higher standard than probable cause) that such is the case is necessary. That certainty is lacking here.

Nevertheless we conclude that under the unusual circumstances of this case the search was valid. In our judgment the facts, to an experienced border agent familiar with the methods adopted by smugglers, established probable cause to believe that the car contained seizable contraband.

Two aspects of this case distinguish it from other cases where probable cause was alleged to exist because the suspect behaved in a manner consistent with smuggling.

First, this was not a case of an isolated instance of coincidence. Here the whole course of conduct observed painted a clear picture to the experienced border agent. Appellants arrived together at El Centro, picked up a car at Calexico, brought it back to El Centro, and later headed for home driving the two cars. This gives cause to believe that the purpose of their trip was to pick up the car and take it home. Cause to believe that the car had recently been in Mexico and contained contraband is established by other facts. The brief trip across the border immediately preceding the pick-up (in light of other facts) suggests that the crossing was a necessary prelude to the pick-up, either for gaining information as to location and identity of the car to be picked up, securing its keys, or making payment for the load. Reinforcing this suggestion were the facts of the car's proximity to the border and the knowledge of the agents that the car's location was at a point frequently used as a contraband drop.

Second, while this behavior alone may be consistent with an innocent purpose, and any suggestion of criminal misconduct coincidental, the additional fact that the appellants appeared to be connected with one known to have engaged in narcotics traffic (the car in which appellants had arrived at El Centro was known to be registered to one who had been arrested in Santa Cruz County in possession of 235 kilos of marijuana) is enough to tip the scales in favor of probable cause to believe that the car contained contraband brought from Mexico.

We find no merit in the contention that the evidence was insufficient to establish the guilt of appellant Williams.

DECISION

Judgment affirmed.

In The United States Court of Appeals
For The Ninth Circuit

Filed Apr 2 1973
Dennis R. Mathews, Clerk U. S. Court of Appeals

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DOUGLAS FREDERICK HELLWIG, *Defendant-Appellant.*	No. 72-2137

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN EDWARD WILLIAMS, *Defendant-Appellant.*	No. 72-2185

On Petition for Rehearing

Before: MERRILL and KOELSCH, Circuit Judges, and GRAY, District Judge

Rehearing denied.